

W.A No.1318/2026

: 1 :

CNR : KLHC010492172026



2026:KER:66329

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K. NATARAJAN

&

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

TUESDAY, THE 1ST DAY OF SEPTEMBER 2026 / 10TH BHADRA, 1948

WA NO. 1318 OF 2026

JUDGMENT DATED 01.06.2026 IN WP(C) NO.26470 OF 2025 OF HIGH COURT OF KERALA

APPELLANTS/WRIT PETITIONERS:

1

[REDACTED]

2

[REDACTED]

BY ADVS.
SMT.T.J.SEEMA
SMT.BHAVANA VELAYUDHAN
SRI.S.SANAL KUMAR (SR.)

RESPONDENTS/RESPONDENTS:

- 1 UNION OF INDIA, REPRESENTED BY ITS SECRETARY, MINISTRY OF HEALTH AND FAMILY WELFARE, SASTHRI BHAVAN, NEW DELHI, PIN - 110 001.
- 2 STATE OF KERALA, REPRESENTED BY ITS SECRETARY, DEPARTMENT OF HEALTH AND FAMILY WELFARE, SECRETARIAT, THIRUVANANTHAPURAM, PIN - 695 001.
- 3 THE KERALA STATE ASSISTED REPRODUCTIVE TECHNOLOGY AND SURROGACY BOARD, REPRESENTED BY ITS CHAIRPERSON, DISTRICT HEALTH SERVICES, GENERAL HOSPITAL JUNCTION, THIRUVANANTHAPURAM, PIN - 695 035.
- 4 SAMAD HOSPITALS, REPRESENTED BY ITS MANAGING DIRECTOR, V.V.ROAD, PATTOR, THIRUVANANTHAPURAM, PIN - 695 035.

BY ADV. SMT.JOLIMA GEORGE, CGC
R1 BY O.M.SHALINA, DEPUTY SOLICITOR GENERAL OF INDIA
R2 & R3 BY SMT. A. SREEKALA, SR. GOVERNMENT PLEADER

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 19.08.2026, THE COURT ON 01.09.2026 DELIVERED THE FOLLOWING:

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'CR'

K. NATARAJAN & JOHNSON JOHN, JJ.

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Dated this the 1st day of September, 2026

JUDGMENT

Johnson John, J.

This intra-court appeal is filed by the writ petitioners challenging the judgment dated 01.06.2026 in W.P.(C) No. 26470 of 2025 dismissing the writ petition.

2. In the writ petition, the following reliefs are sought for:

i) To declare that Section 4(iii)(c)(I) of the Surrogacy (Regulation) Act, 2021 to the extent it defines the maximum age for intending couple to seek Surrogacy services from licensed clinics is violative of Article 21 of the Constitution of India;

ii) To declare that Section 4(iii)(c)(I) of the Surrogacy (Regulation) Act, 2021 to the extent it defines the maximum age for intending couple to seek Surrogacy services is violative of Article 14 of the Constitution of India;

iii) To declare that the 1st petitioner, who comes within the permissible age limit prescribed under Section 4(iii)(c)(I) and section 2(1)(s) of the Act, is eligible to avail ART services utilizing the embryos which were frozen

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when the petitioners were within the age limit prescribed under the Act, regardless of the age of the 2nd petitioner.

iv) To issue a writ of mandamus or any other appropriate writ, direction or order directing the respondents 1 to 4 to permit the petitioners to continue availing surrogacy services from the 4th respondent utilizing their frozen embryos after obtaining requisite documents and certification essential for continuing the surrogacy process;

3. In the impugned judgment, the learned single Judge found that the issue is squarely covered by the judgment in ***Sajithanand S.@ Sajitha Manoharan and another vs. Union of India and Others*** [2026(3) KHC 549].

4. When the appeal came up for hearing, the learned counsel for the appellants submitted that the 4th respondent—Samad Hospitals is only a formal party and hence, notice to the 4th respondent is to be dispensed with. Accepting the submission of the learned counsel for the appellants, issuance of notice to the 4th respondent was dispensed with.

5. Heard Sri. Sanal Kumar S., the learned Senior counsel for the appellants, Smt. O.M. Shalina, learned Deputy Solicitor General of India appearing for the first respondent and Smt. A. Sreekala,



learned Senior Government Pleader appearing for respondents 2 and 3.

6. The learned counsel for the appellants argued that the learned single Judge failed to examine the specific factual and legal issues arising in this case and mechanically applied the decision of this Court in ***Sajithanand*** (supra) and that the appellants commenced the surrogacy process during the year 2022 and at the relevant time, the second appellant was admittedly below the upper age limit of 55 years. It is also argued that pursuant to the treatment undertaken, embryos created from the gametes of the appellants were successfully fertilised and cryopreserved on 30.08.2022.

7. It is pointed out that on 21.6.2023, the District Medical Officer, Thiruvananthapuram, has issued the certificate of medical indication for intending couples certifying the medical necessity for resorting to surrogacy and therefore, the appellants are eligible to proceed with surrogacy process in terms of the statutory framework. The appellants along with the surrogate mother, filed C.M.P No. 670 of

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2025 before the Judicial First Class Magistrate Court-XI, Thiruvananthapuram seeking orders regarding parentage and custody of the child proposed to be born through the surrogacy arrangement and the said application was allowed by the learned Magistrate as per order dated 03.05.2025. Thereafter, when the appellants approached the third respondent—Kerala State Assisted Reproductive Technology and Surrogacy Board on 27.05.2025 for eligibility certificate under Section 4(iii)(c)(I) of the Surrogacy (Regulation) Act, 2021 ('Surrogacy Act' for short), the same was denied on the ground that the second appellant has crossed the prescribed age limit.

8. The learned counsel for the appellants argued that the age restrictions under the Surrogacy Act could not be applied in a manner that retrospectively defeats reproductive procedure which had already substantially progressed. It is argued that the learned single Judge failed to examine the crucial issue as to whether the relevant date for determining eligibility under Section 4(iii)(c)(I) is the date on which the reproductive procedure is commenced and embryos are created or the date on which the eligibility certificate is issued. It is also



argued that the interpretation followed by the learned single Judge results in an unreasonable classification that offends Article 14 of the Constitution of India, inasmuch as two intending couples identically placed in every other respect having created and cryopreserved embryos while both partners were within the statutory age limits and denying access to surrogacy solely on account of the subsequent attainment of age by the second appellant.

9. The learned counsel for the first respondent argued that the appropriate authority under Section 35 of the Surrogacy Act is required to consider the age of the intending couple as on the date of issuance of the eligibility certificate and that surrogacy procedures cannot be conducted before satisfying all the conditions specified in sub-clause (iii) of Section 4 of the Surrogacy Act, which contemplates possession of an eligibility certificate for the surrogate mother and the intending couple. It is pointed out that the Surrogacy Act came into force with effect from 25.01.2022 and the averments in paragraph 3 of the writ petition would show that the appellants had initiated the proceedings to undergo surrogacy from the year 2022 and that the embryos were kept frozen on 30.08.2022. Therefore, admittedly, the surrogacy proceedings commenced after the coming into force of the

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Surrogacy Act on 25.01.2022 without obtaining the eligibility certificate for the intending couple from the appropriate authority.

10. It is also pointed out that the objective of the enactment was for prohibition of commercial surrogacy and to prevent incidents of unethical practices, exploitation of surrogate mothers and abandonment of children born out of surrogacy and import of human embryos and gametes and therefore, considering the objectives and purpose behind the Act, it cannot be held that fixing an upper age limit for the intending couple as on the day of certification is against the principles of equality and there is no justifiable grounds to interfere with the findings in the impugned judgment which followed the reasonings in ***Sajithanand*** (supra).

11. The learned Senior Government Pleader appearing for respondents 2 and 3 also supported the arguments of the learned Deputy Solicitor General of India appearing for the first respondent.

12. The points that arise for determination are the following:

1. Whether the present case comes under the category of cases where the surrogacy procedure commenced prior to the commencement of the Surrogacy Act?

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2. Whether the contentions challenging the constitutional validity of Section 4(iii)(c)(I) of the Surrogacy Act is legally sustainable?

Points 1 & 2:

13. Section 4 of the Surrogacy Act is extracted below for convenient reference:

"4: Regulation of surrogacy and surrogacy procedures.-- On and from the date of commencement of this Act,-

(i) no place including a surrogacy clinic shall be used or cause to be used by any person for conducting surrogacy or surrogacy procedures, except for the purposes specified in clause (ii) and after satisfying all the conditions specified in clause (iii);

(ii) no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or availed of, except for the following purposes, namely:-

(a) when an intending couple has a medical indication necessitating gestational surrogacy:

Provided that a couple of Indian origin or an intending woman who intends to avail surrogacy, shall obtain a certificate of recommendation from the Board on an application made by the said persons in such form and manner as may be prescribed.

Explanation.--For the purposes of this sub-clause and item (I) of sub-clause (a) of clause (iii) the expression "gestational surrogacy" means a practice whereby a surrogate mother carries a child for the intending couple through implantation of embryo in her womb and the child is not genetically related to the surrogate mother;



- (b)when it is only for altruistic surrogacy purposes;
- (c)when it is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures;
- (d)when it is not for producing children for sale, prostitution or any other form of exploitation; and
- (e) any other condition or disease as may be specified by regulations made by the Board;

(iii) no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or initiated, unless the Director or in-charge of the surrogacy clinic and the person qualified to do so are satisfied, for reasons to be recorded in writing, that the following conditions have been fulfilled, namely:-

(a) the intending couple is in possession of a certificate of essentiality issued by the appropriate authority, after satisfying itself, for the reasons to be recorded in writing, about the fulfilment of the following conditions, namely:-

(I) a certificate of a medical indication in favour of either or both members of the intending couple or intending woman necessitating gestational surrogacy from a District Medical Board.

Explanation.--For the purposes of this item, the expression "District Medical Board" means a medical board under the Chairpersonship of Chief Medical Officer or Chief Civil Surgeon or Joint Director of Health Services of the district and comprising of at least two other specialists, namely, the chief gynaecologist or obstetrician and chief paediatrician of the district;

(II) an order concerning the parentage and custody of the child to be



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born through surrogacy, has been passed by a Court of the Magistrate of the first class or above on an application made by the intending couple or the intending woman and the surrogate mother, which shall be the birth affidavit after the surrogate child is born; and

(III) an insurance coverage of such amount and in such manner as may be prescribed in favour of the surrogate mother for a period of thirty-six months covering post-partum delivery complications from an insurance company or an agent recognised by the Insurance Regulatory and Development Authority established under the Insurance Regulatory and Development Authority Act, 1999 (41 of 1999);

(b) the surrogate mother is in possession of an eligibility certificate issued by the appropriate authority on fulfilment of the following conditions, namely:-

(I) no woman, other than an ever married woman having a child of her own and between the age of 25 to 35 years on the day of implantation, shall be a surrogate mother or help in surrogacy by donating her egg or oocyte or otherwise;

(II) a willing woman shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act:

Provided that the intending couple or the intending woman shall approach the appropriate authority with a willing woman who agrees to act as a surrogate mother;

(III) no woman shall act as a surrogate mother by providing her own gametes;

(IV) no woman shall act as a surrogate mother more than once in her lifetime:

Provided that the number of attempts for surrogacy procedures on the



surrogate mother shall be such as may be prescribed; and

(V) a certificate of medical and psychological fitness for surrogacy and surrogacy procedures from a registered medical practitioner;

(c) an eligibility certificate for intending couple is issued separately by the appropriate authority on fulfilment of the following conditions, namely:-

(I) the intending couple are married and between the age of 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification;

(II) the intending couple have not had any surviving child biologically or through adoption or through surrogacy earlier:

Provided that nothing contained in this item shall affect the intending couple who have a child and who is mentally or physically challenged or suffers from life threatening disorder or fatal illness with no permanent cure and approved by the appropriate authority with due medical certificate from a District Medical Board; and

(III) such other conditions as may be specified by the regulations.”

14. In ***Sajithanand*** (supra), it was held as follows in paragraphs 21 to 24:

“21. By prescribing age limits, the Act seeks to prevent high risk pregnancies and ensure that reproductive technologies are not misused. The age restrictions does not infringe Art.21, but it actually advances its protective scope as argued by the learned CGC. Age restrictions act as a safeguard to ensure that only women within a safe and appropriate age bracket, capable of informed consent and physical endurance participate in the surrogacy. The age



restrictions satisfy the doctrine of proportionality as evolved in constitutional jurisprudence. The age restrictions are suitable as they directly address medical and ethical concerns. Unregulated reproductive practice can lead to serious harm. The age restrictions are not arbitrary. It strikes a careful balance between individual choice and public health. Reproductive rights though fundamental are not absolute. They are subject to reasonable restrictions.

22. The age restrictions are grounded on medical sciences, ethical necessity and social welfare and they meet the constitutional standards of reasonableness and proportionality. Age restrictions are not an infringement of rights, but it act as a protective frame work. Regulation of reproductive technology is not a denial of liberty, but a structured exercise of it.

23. The objective behind age restriction is to ensure safe reproduction, child welfare and medical viability. Thus classification based on age is scientifically grounded and directly linked to the purpose. Reproductive technologies affect the family structure, child rights and public morality. State can impose reasonable restrictions in larger societal interest. Fertility, pregnancy outcomes and risks associated with child birth are directly linked to age. The age restrictions satisfies the test of proportionality. It is a measured restriction not an excessive one.

24. The age limits prescribed under the Surrogacy (Regulation) Act, 2021 are constitutionally valid and they represents a carefully designed regulatory mechanism to ensure that surrogacy is practiced in a safe, ethical and non exploitative manner consistent with constitutional principles.”

15. In ***Vijaya Kumari S v. Union of India*** [2025 KHC 6856], the Honourable Supreme Court held thus:



“15.9. We therefore hold that creation of embryos and freezing of the same is crystallization of the said process as it clearly demonstrates the intention of the couples i.e., intending couples, in the instant cases. The earlier stages, namely, (i) Visit to surrogacy clinic, (ii) Counselling of the patient, (iii) Obtaining of the various permissions / certificates from Appropriate Authorities under S.4 of the Act, (iv) Extraction of gametes of Stage A, are no doubt part of surrogacy procedure but are stages prior to the crystallization of the intention of the couple to undertake a surrogacy procedure an interpretation we are giving in the context of age barriers. Therefore, when there was no age restriction at the stage of creation of embryos and freezing them i.e., prior to the enforcement of the Act, when the intending couples are at the threshold of Stage B, the age restriction under the Act cannot be permitted to operate retrospectively on such intending couples as in the present cases so as to frustrate not just the surrogacy procedure but also their right to have a surrogate child or become parents, the latter being a constitutional right under Art.21 of the Constitution.

15.10. Therefore, the rule against retrospective operation of statutes applies in the instant case in order to preserve the rights of intending couples such as the petitioners / applicant in the present case. If we do not apply the aforesaid principle of interpretation of statutes we would be failing in our duty to uphold the constitutional right of such intending couples under Art.21 of the Constitution. Therefore, we hold that the age bar does not apply to intending couples such as the ones we are considering in the present cases.

16. Thus, if an intending couple had -



- (i) commenced the surrogacy procedure prior to the commencement of the Act i.e., 25/01/2022; and
- (ii) were at the stage of creation of embryos and freezing after extraction of gametes (Stage A of the diagram); and
- (iii) on the threshold of transfer of embryos to the uterus of the surrogate mother (Stage B of the diagram)

The age restriction under S.4(iii)(c)(I) of the Act would not apply. The competent authority, on being satisfied about the aforesaid conditions (i), (ii) and (iii) above shall issue the certification provided R.14 of the Rules are satisfied by the intending couples.

17. In the result, we hold that S.4(iii)(c)(I) does not have retrospective operation and therefore, would not apply to the petitioners and applicants who are the intending couples. We reiterate that we have not considered the validity of the age restrictions in this order but only the applicability of the same to the petitioners and the applicants herein. The writ petitions and the application are allowed in the aforesaid terms.”

16. In ***Rajitha v. Union of India*** [2025 (2) KLT 308], a co-ordinate Bench of this Court held thus in paragraph 29:

“29. The scheme of the Act of 2021 thus provides a legal framework for regulating surrogacy. It prohibits commercial surrogacy to prevent exploitation while permitting altruistic surrogacy. The Act allows married couples with a medical necessity to opt for surrogacy. It provides for the rights and consent of surrogate mothers, mandates the registration of surrogacy clinics, and establishes National and State Surrogacy Boards. The Act focuses on prohibiting unethical practices



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like sex selection, child abandonment, and forced surrogacy. The intention of the Act is thus to ensure ethical and legal safeguards. This is important when interpreting the age eligibility for an intending mother, particularly whether the upper limit of 50 years excludes women who have turned 50. Applying the principle of purposive interpretation, the provision on age eligibility should be understood in a way that ensures ethical surrogacy practices rather than creating unnecessary restrictions. The Act does not seek to arbitrarily deny opportunities for intending couples but to regulate surrogacy within a structured legal framework. Therefore, there is no indication in the scheme of the Act to deny eligibility to intending woman up to her reaching 51 years.”

17. The learned counsel for the appellants argued that at the time when the fertilised embryos were kept frozen, the appellants were within the age limit prescribed under the Surrogacy Act. But, admittedly, the appellants have not obtained the eligibility certificate under Section 4(iii)(c)(I) of the Surrogacy Act before the commencement of the surrogacy procedure and for the purpose of eligibility certificate, the age as on the day of certification is crucial and therefore, the contention of the learned counsel for the appellants cannot be accepted



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18. Another argument of the learned counsel for the appellants is that in ***Vijaya Kumari's*** case (supra) the Honourable Supreme Court held that the age restrictions under the Surrogacy Act cannot be permitted to operate retrospectively to intending couples who commenced the surrogacy procedure prior to the commencement of the Act from utilising the embryos which were frozen, inasmuch as the Surrogacy Act has no retrospective operation. But, the averments in paragraph 3 of the writ petition clearly shows that the appellants initiated the proceedings to undergo surrogacy and the fertilized embryos were kept frozen on 30.08.2022, which is after the commencement of the Act on 25.01.2022 and therefore, we find that the present case cannot be included in the category of cases where surrogacy procedure commenced prior to the coming into force of the Act.

19. It is pertinent to note that Section 4 of the Surrogacy Act prohibits the use of any place including a surrogacy clinic for conducting surrogacy or surrogacy procedures except for the purposes



specified in sub clause (ii) and after satisfying all the conditions specified in sub clause (iii). Sections 39 and 41 prescribes the punishments for contravention of provisions of the Act and therefore, initiation of the proceedings to undergo surrogacy after the commencement of the Act without certification which attract penal consequences cannot be accepted as a valid ground for claiming exemption.

20. The learned counsel for the appellants challenges the constitutional validity of Section 4(iii)(c)(I) on the ground that it is violative of Articles 14 and 21 of the Constitution of India. An attempt is also made to compare the various provisions of the Assisted Reproductive Technology (Regulation) Act, 2021 ('Act, 2021' for short) with that of the provisions in the Surrogacy Act in support of the contention that the entire scheme of the Surrogacy Act is violative of Articles 14 and 21 of the Constitution of India.

21. The rule of purposive interpretation requires the court to adopt an object oriented approach keeping in mind the ultimate objective of the enactment which the legislature has in its view and to



make such construction so as to suppress the mischief and advance the remedy to prevent the enactment from becoming futile.

22. It is pertinent to note that the objects and reasons behind the Surrogacy Act and the Act, 2021 are different and it is well settled that the interpretation of phrases in one statute should not be conflated with interpretations from another, especially when the wording, policy and legislative intent differ. The statement of objects and reasons in the Surrogacy Act reads thus:

“Statement of Objects and Reasons. - India has emerged as a surrogacy hub for couples from different countries for past few years. There have been reported incidents of unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and import of human embryos and gametes. Widespread condemnation of commercial surrogacy in India has been regularly reflected in different print and electronic media for last few years. The Law Commission of India has, in its 228th Report, also recommended for prohibition of commercial surrogacy by enacting a suitable legislation. Due to lack of legislation to regulate surrogacy, the practice of surrogacy has been misused by the surrogacy clinics, which leads to rampant of commercial surrogacy and unethical practices in the said area of surrogacy.”

23. It is well settled that Article 14 of the Constitution of India does not prohibit a reasonable classification in order to accomplish the specific objects to be achieved, provided such reasonable classification

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should not be artificial or arbitrary and that it must be based on significant differentiation and we find that the age restriction in the Surrogacy Act is based on a reasonable relationship with the required aim sought to be achieved by the law and therefore, we find that the contentions of the learned counsel for the appellants in this regard are not legally sustainable. The points are answered against the appellants and hence, the writ appeal is liable to be dismissed.

In the result, this appeal is dismissed. No order as to costs.

sd/-

**K. NATARAJAN,
JUDGE.**

sd/-

**JOHNSON JOHN,
JUDGE.**

Rv

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APPENDIX OF WA NO. 1318 OF 2026

APPELLANTS' ANNEXURES:

- | | |
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| Annexure A1 | A TRUE COPY OF THE DISCHARGE SUMMARY ISSUED BY KJK HOSPITAL, THIRUVANANTHAPURAM RELATING TO TREATMENT UNDERGONE BY THE 1ST APPELLANT FROM 24.11.2016 TO 26.11.2016 FOR PRIMARY INFERTILITY, LAPAROSCOPIC MYOMECTOMY AND DIAGNOSTIC HYSTEROSCOPY. |
| Annexure A2 | TRUE COPY OF THE ICST TREATMENT SUMMARY ISSUED BY KJK HOSPITAL EVIDENCING ART TREATMENT UNDERGONE BY THE APPELLANTS INCLUDING OVUM PICK UP ON 13.07.2018, FERTILIZATION BY ICSI AND EMBRYO TRANSFER ON 16.07.2018. |
| Annexure A3 | TRUE COPY OF THE FET (FROZEN EMBRYO TRANSFER) TREATMENT SUMMARY ISSUED BY KJK HOSPITAL SHOWING THAWING AND TRANSFER OF FROZEN EMBRYOS ON 04.10.2018. |
| Annexure A4 | A TRUE COPY OF THE FET TREATMENT SUMMARY ISSUED BY KJK HOSPITAL EVIDENCING A FURTHER FROZEN EMBRYO TRANSFER PROCEDURE UNDERTAKEN ON 15.07.2019. |
| Annexure A5 | A TRUE COPY OF THE DISCHARGE SUMMARY ISSUED BY SAMAD HOSPITAL, THIRUVANANTHAPURAM RELATING TO OVUM RETRIEVAL PROCEDURES UNDERTAKEN BY THE 1ST APPELLANT ON 11.05.2021. |
| Annexure A6 | A TRUE COPY OF THE DISCHARGE SUMMARY ISSUED BY SAMAD HOSPITAL, THIRUVANANTHAPURAM RELATING TO OVUM PICK UP AND DUAL STIMULATION PROCEDURES UNDERTAKEN FROM 29.05.2021 TO 30.05.2021. |
| Annexure A7 | A TRUE COPY OF THE DISCHARGE SUMMARY ISSUED BY SAMAD HOSPITAL RELATING TO IVF TREATMENT AND SPERM E3G±39= RETRIEVAL BY TESE UNDERGONE BY THE 2ND APPELLANT FROM 02.12.2021 TO 03.12.2021. |

RESPONDENTS' EXHIBITS: NIL

/True Copy/

PS to Judge

Rv